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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92053911
Party	Defendant Ovation, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Trademark Registration Nos. 3,755,679, 3,755,678 and 3,670,163 Ovation LLC, a Delaware Limited Liability Company,	)	
	)	
Petitioner,	)	REGISTRANT'S RESPONSE
	)	TO MOTION TO STRIKE
v.	)	
	)	
Ovation, Inc., a Tennessee Corporation,	)	Cancellation No. 92053911
	)	
Registrant.	)	
	)	

**REGISTRANT'S RESPONSE TO PETITIONER'S MOTION TO STRIKE**

The Registrant, Ovation, Inc., respectfully offers the following Response to Petitioner's Motion to Strike. Petitioner's Motion is without merit and is nothing more than an attempt to file an improper surreply brief. The Motion does not even come close to making the necessary showing to strike a pleading and should be denied on that basis alone. In addition, the Motion merely underscores Petitioner's insistence on making this litigation as unpleasant, expensive, and uncollegial for Registrant as possible, as well as demonstrates a complete disregard for the Board's time and resources.

**I. PETITIONER HAS NOT EVEN ATTEMPTED TO MAKE THE SHOWING NECESSARY TO STRIKE A PLEADING.**

Motions to Strike are governed by Fed. R. Civ. Pro. 12(f), which provides that a court may strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed.R.Civ.P. 12(f); *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir.2010). The function of a motion to strike is to avoid the unnecessary expenditures that arise throughout litigation by dispensing of any spurious issues prior to trial. *Chong v. State*

*Farm Mut. Auto. Ins. Co.*, 428 F.Supp.2d 1136, 1139 (S.D.Cal.2006). Rule 12(f) motions “are generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delaying tactic.” *Neilson v. Union Bank of Cal., N.A.*, 290 F.Supp.2d 1101, 1152 (C.D.Cal.2003). Thus, courts generally grant a motion to strike only where it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation. *Walters v. Fidelity Mortg. of Cal.*, 730 F.Supp.2d 1185, 1196 (E.D.Cal.2010).

The Trademark Trial and Appeal Board is equally suspicious of motions to strike. As a general rule, the Board disfavors motions to strike, and will not strike matter unless it clearly has *no bearing on the issues involved*. *America Online v. Prabhu Mohapatra*, 2004 WL 1799913, \*1 (TTAB 2004) (emphasis added); *Society of Mexican American*, 2002 WL 31488947, \*1-2 (TTAB 2002); *Kellogg Co. v. Tomy Co.*, 2003 WL 22931587, \*3 (TTAB 2003). There has been no showing, or even so much as an *assertion*, that Registrant’s Reply had no bearing on the issues involved. It obviously had direct bearing on the issues involved because it laid out facts that demonstrated that Petitioner’s arguments that it would be severely damaged by Registrant’s first request for an extension of deadlines were not persuasive or convincing. It is difficult for Petitioner to show that it would be damaged by a brief delay when it has previously requested three extensions of more than twice the amount now requested by Registrant. Registrant agreed to the requested extensions without controversy in an effort to accommodate Petitioner’s counsel. However, when the exact same courtesy is requested by Registrant, it is denied, with the excuse that Petitioner will be “severely prejudiced” by such an extension and met with meritless motions such as the one currently before the Board. In short, Petitioner wants to strike the Reply



because it raises facts that are not helpful to its position, not because the Reply has no bearing on the issues involved.

## **II. THE MOTION TO STRIKE IS MERELY A SUBTREFUGE FOR FILING A SURREPLY.**

A motion to strike should be denied when it is merely an attempt to circumvent the rules and file a prohibited surreply brief. There is no provision in the rules for a reply brief, rebuttal brief, rejoinder brief, etc. by a party in the position of Petitioner. Trademark Rule 2.128(a)(1), 37 CFR § 2.128(a)(1). *See also* *Levis Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464, 1465 n.3 (TTAB 1993) (applicant's motion to strike opposer's reply brief given no consideration because it was essentially an attempt to reply to opposer's reply brief). *See also* *Heaven Hill Distilleries, Inc. v. Yassinn Patrice Diallo*, 2011 WL 5600320, \*2 (TTAB 2011) (“[a] review of applicant’s motion reveals that is primarily nothing more than an attempt to reply to opposer’s reply brief”); *Guthy-renker Corporation v. Michael Boyd*, 2008 WL 4922487, \*1 (TTAB 2008) (“[p]arties may not couch a surreply as a new motion in order to avoid the prohibition on surreplies.”). Because Petitioner’s Motion to Strike does not even attempt to allege or argue that Registrant’s Reply contained “redundant, immaterial, impertinent, or scandalous matter,” or that it had no bearing on the issues involved, it is merely an attempt to file a surreply and should be ignored in its entirety.

## **III. THE ASSERTIONS MADE IN REGISTRANT’S REPLY BRIEF WERE TRUE.**

All of the statements made in Registrant’s Reply brief were true. As of the time of the filing of Registrant’s Reply brief, Petitioner had not served its Response. Registrant only learned of the existence of the Response by checking the TTAB’s website. Despite the fact that the parties were corresponding daily by email, Petitioner did not serve its reply by email. There had been two prior occasions where Registrant did not receive copies of items that Petitioner claimed

to have served and, on this occasion, the service copy came eight days after the filing was made. *See Exhibit A*. While Registrant concedes that the Response eventually arrived, Petitioner's insistence on serving the documents in the slowest possible fashion belies their insistence that they are "severely prejudiced" by any delay in this proceeding.

Second, as Petitioner's own motion makes clear, they admit to receiving a copy of Registrant's Motion to Extend Deadlines on March 26, 2012, by email, even though the Motion was not actually filed with the TTAB until the next day because the website was down on the evening of March 26<sup>th</sup>. *See Exhibit E* to Petitioner's Surreply brief. This fact is actually immaterial, however, because the TTAB Rules make clear that experts can be hired after the date for disclosing experts has passed. *See 37 CFR §2.120(a)(2)(emphasis added)* ("If the expert is retained after the deadline for disclosure of expert testimony, the party must promptly file a motion for leave to use expert testimony. Upon disclosure by any party of plans to use expert testimony, *whether before or after the deadline for disclosing expert testimony*, the Board may issue an order regarding expert discovery and/or set a deadline for any other party to disclose plans to use a rebuttal expert..."). The Rules also contemplate the hiring of a rebuttal expert and allow that such can be disclosed 30 days after the disclosure of the other party's expert. *See Fed. R. Civ. P. 26(a)(2)(ii)*. Consequently, because the request was made nearly one month before the original close of the discovery period, it was timely and Petitioner's insistence to the contrary is without merit.

Third, Petitioner takes issue with Registrant's assertion that Petitioner wanted to take depositions outside the discovery deadline. This statement is absolutely true and Petitioner's convoluted explanation to the contrary does not make sense. Petitioner did not request the dates for the taking of any depositions until early April (which, incidentally, was after Registrant's



request for dates). Registrant's client representative travels extensively, all over the world, all of the time. There simply were no available dates in April by the time Petitioner finally got around to asking on April 5<sup>th</sup>, 2012. Petitioner does not even attempt to explain how it planned to take the depositions of three third-party witnesses located in England and New Zealand prior to April 25<sup>th</sup>, when it did not even ask for dates until April 5, 2012. In short, if the deadlines were not extended in this case and if Registrant had not so agreed, Petitioner would not have been able to take a single fact deposition. Consequently, Registrant's statements on this point were not "misleading" and Petitioner's assertions to the contrary are unprofessional and untrue.

#### **IV. REQUESTS FOR EXTENSIONS ARE LIBERALLY GRANTED IN THE ABSENSE OF EVIDENCE OF BAD FAITH OR ABUSE OF THE PRIVILEGE.**

Notably, Petitioner's surreply brief is devoid of explanation as to why it cited all those inapplicable cases in its Response. As Registrant's Reply made clear, the cases cited by Petitioner do not address the situation currently before the Board. Requests for Extensions of Deadlines are ordinarily liberally granted in the absence of evidence of negligence, bad faith, or the abuse of the privilege of extensions. *See American Vitamin Products, Inc. v. Dowbrands, Inc.*, 22 U.S.P.Q.2d 1313, 1315 (TTAB 1992). Registrant has articulated reasons that demonstrate why additional time is needed: the associate on the file left and Registrant's counsel needed additional time to hire another trademark associate. In addition, Registrant's counsel wanted the benefit of reviewing Petitioner's discovery responses before determining whether it was necessary to incur the expense of hiring a rebuttal expert. Registrant has never requested an extension on this matter before and has diligently worked this case---providing discovery responses and hundreds of pages of documents and serving its own written discovery nearly six weeks before the original deadline ran. The burden then shifts to Petitioner to establish that these

facts are not true. There has been no evidence that Registrant's counsel is guilty of negligence, bad faith, or has abused the privilege of requesting extensions. As such, Registrant's Request to Extend the Deadlines should be granted and it asks the Board to so hold.

## CONCLUSION

Petitioner has not established that Registrant's Reply contained any redundant, immaterial, impertinent, or scandalous matter or that it has no bearing on the issues in this case. Instead, it is merely an improper attempt to file a surreply brief and should be denied in its entirety. For the reasons set forth above, the statements made in Registrant's Reply brief were true and demonstrate that its first Request for an Extension of Deadlines should be granted. For the foregoing reasons, Registrant requests that Petitioner's Motion to Strike be denied and Registrant's Request to Extend Deadlines be granted.

Respectfully Submitted on

May 16, 2012

BASS, BERRY &amp; SIMS PLC

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Nashville, Tennessee 37201  
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*Attorneys for Registrant*

### CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2012, I caused to be served a true and correct copy of the foregoing by the method by regular mail and email, addressed as follows:

Wendy Mantell, Esq.  
Greenberg Traurig LLP  
2450 Colorado Avenue  
Suite 400E  
Santa Monica, CA 90405  
mantellw@gtlaw.com

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Irvine, CA 92620  
etenenaoki@kdfirm.com



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Paige W. Mills, Esq.  
Bass, Berry & Sims PLC



# Exhibit A

**BASS**  
BERRY • SIMS<sub>nc</sub>

Palge W. Mills  
PHONE: (615) 742-7770  
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150 Third Avenue South, Suite 2800  
Nashville, TN 37201  
(615) 742-6200

April 18, 2012

**VIA EMAIL AND CERTIFIED MAIL**

Wendy Mantell  
Candice E. Kim  
Greenburg Traurig, LLP  
2450 Colorado Avenue  
Suite 400E  
Santa Monica, CA 90404

RE: Ovation v. Ovation, Cancellation Proceeding No. 92-053,911  
Your letter of April 3, 2012

Dear Ms. Kim and Ms. Mantell:

First, I would appreciate it if you would provide me with dates that your 30(b)(6) witness and your expert are available and the city where each witness lives and works in accordance with my email to you on April 4, 2012.

On April 5, 2012, you inquired about dates that my client is available for a deposition. Mr. Sifford will be in Miami, Florida for the last two weeks of April (with the exception of one or two days that he is otherwise unavailable) and in London, England for the first two weeks of May. He is available to be deposed in Nashville, Tennessee on May 17<sup>th</sup>, 18<sup>th</sup>, or 21<sup>st</sup>, 2012. On April 5, 2012, you also inquired about the possibility of deposing three witnesses that reside outside of the United States. I have made inquiries to determine if these individuals are willing to submit to a voluntary deposition and I have been informed that they are not willing. If you wish to pursue taking testimony from these witnesses, you will need to pursue the letters rogatory procedure.

Assuming that the Board does not grant my motion, I am willing to agree that you may take these depositions within a reasonable period of time past the deadline for factual discovery, provided that I am also extended the same courtesy. If we cannot reach a mutually agreeable schedule for *both* sides to complete their depositions, I do not consent for you to take these depositions outside the discovery deadlines.

Second, I would appreciate your providing a courtesy copy to me by email whenever you file something in this proceeding. There have been at least two occasions in this case in which I did not receive a timely copy of an item your firm claimed to have served. While I did finally receive a copy late this afternoon of your filing from April 10<sup>th</sup>, sending an item via certified mail virtually guarantees that it will not arrive in less than

one week and, often, much longer than that. While I have no objection to your using certified mail, I would appreciate the courtesy of an electronic copy so that I know the filing exists and will know to look into the matter if it doesn't arrive. If you do not want me to email you copies of items that I file, I'm happy to stop that practice if that is your preference.

I have reproduced the Interrogatories you listed in your letter of April 3, 2012, and your commentary about our original answers, while listing our responses below:

**INTERROGATORY NO. 3:**

IDENTIFY all of the reasons why YOU decided to select and adopt the CHALLENGED WORD MARK.

**INTERROGATORY NO. 4:**

IDENTIFY all of the reasons why YOU decided to select and adopt the CHALLENGED DESIGN MARK.

**REQUEST NO. 5:**

All DOCUMENTS identifying the reasons why the CHALLENGED WORD MARK was adopted by REGISTRANT.

**REQUEST NO. 6:**

All DOCUMENTS identifying the reasons why the CHALLENGED DESIGN MARK was adopted by REGISTRANT.

In response to Interrogatory No. 3, you state that after a "lengthy process," the word OVATION was the best word that exemplified the outcome of your client's services, however, you did not produce any documents relating to the "lengthy process" and further assert that there are no documents in response to Request No. 5. Additionally, you state that after carefully reviewing "hundreds of different design mark options," your client's current design mark was the best fit for the company. Again, you did not produce any documents relating to the "hundreds of different design marks" that were reviewed and further assert that there are no documents in response to Request No. 6. Please either produce the documents responsive to these requests or confirm that no documents exist in connection with the "lengthy process" undertaken to select and adopt the word mark or the review of "hundreds of different design mark options."

**RESPONSE:** Registrant has found additional documents that demonstrate the options considered for its logo. All of these options were considered and eventually rejected because Registrant did not like them as well as the one finally selected. These additional documents will be provided as a supplement to Registrant's original response.



**INTERROGATORY NO. 13:**

IDENTIFY REGISTRANT'S annual expenditures for advertising, promoting and marketing the goods and services offered in connection with the CHALLENGED WORD MARK.

**INTERROGATORY NO. 14:**

IDENTIFY REGISTRANT'S annual expenditures for advertising, promoting and marketing the goods and services offered in connection with the CHALLENGED DESIGN MARK.

**INTERROGATORY NO. 15:**

IDENTIFY the annual sales of goods and services in dollars made in connection with the CHALLENGED MARKS for each year since inception.

You objected to these interrogatories on the basis that they seek information regarding damages and confidential financial and business information irrelevant to and beyond the scope of this proceeding. These interrogatories seek information that is relevant and discoverable in that, among other things, this information may negate or support any claim or defense of fame of your client's mark(s), which, as you are likely well aware, is an important factor in an analysis for likelihood of confusion. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973). See also request 31-33, 36

**RESPONSE:** Registrant renews its objections to these interrogatories. Unlike Petitioner, Registrant has never alleged that its mark is famous-- either as a claim or a defense--in this or any other proceeding. Nor is this a matter in which acquired distinction is at issue. Accordingly, this information is not relevant to this proceeding and Registrant should not be required to give its confidential financial information over to Petitioner.

**INTERROGATORY NO. 25:**

IDENTIFY all facts and DOCUMENTS that support or refute YOUR First Affirmative Defense in each of the ANSWERS that "Petitioner is not entitled to seek cancellation of Registrant's marks to the extent that such registrations contain goods and services other than "cable television broadcasting services." In short, the Petitioner's Petition cannot exceed the scope of its application."

**INTERROGATORY NO. 26:**

IDENTIFY all facts and DOCUMENTS that support or refute YOUR Second Affirmative Defense in each of the ANSWERS that "the Petition fails to state a sufficient basis on which to cancel the registration of Registrant's mark and fails to state a claim upon which relief may be granted."

**INTERROGATORY NO. 27:**

IDENTIFY all facts and DOCUMENTS that support or refute YOUR Third Affirmative Defense in each of the ANSWERS that the "Petition is barred by the equitable doctrines of laches, acquiescence, waiver and/or estoppel."

**INTERROGATORY NO. 28:**

IDENTIFY all facts and DOCUMENTS that support or refute YOUR Fourth Affirmative Defense in each of the ANSWERS that "Petitioner has not continuously used its claimed marks for all goods and services named in the Petition since 1995."

**INTERROGATORY NO. 29:**

IDENTIFY all facts and DOCUMENTS that support or refute YOUR Fifth Affirmative Defense in each of the ANSWERS that "Petitioner cannot establish nationwide use of its claimed marks prior to the filing date of Registrant's Mark."

**INTERROGATORY NO. 30:**

IDENTIFY all facts and DOCUMENTS that support or refute YOUR Sixth Affirmative Defense in each of the ANSWERS that "Petitioner cannot establish use in commerce for the indicated goods and services that predates Registrant's use."

**INTERROGATORY NO. 31:**

IDENTIFY all facts and DOCUMENTS that support or refute YOUR Seventh Affirmative Defense in each of the ANSWERS that "Registrant asserts that its existing registrations are valid, proper, and controlling of the parties' rights in this matter . . . [but] should Petitioner be able to establish a date of first use that predates Registrant's date of first use, as the first to register, Registrant is entitled to maintain its nationwide rights created by its registration, subject only to the territory that Petitioner is able to establish existed at the time of Registrant's application."

You state certain assumptions in your response to these interrogatories but did not appear to produce any documents used to form such assumptions. Each interrogatory above requires that you not only identify facts but also any documents that support or refute these affirmative defenses. We also require that you produce any and all documents relied upon to support or refute your affirmative defenses. For example, your response to Interrogatory No. 28 is that Petitioner's "mark was not at all widely used and was, at most, in a few markets with a very small number of viewers who viewed arts programming in the middle of the night." However, you did not produce any documents that you relied upon to form the basis of this response. Please provide any and all documents you relied upon to either refute or support your affirmative defenses one through seven.

RESPONSE: Please see documents REG000294-394 and REG000472, the USPTO registry, Petitioner's website, the Wikipedia entry about Petitioner and the supporting references for that article.

**REQUEST NO. 11:**

DOCUMENTS sufficient to identify the goods and services that YOU have offered in commerce in connection with the CHALLENGED WORD MARK, including but not limited to communications, invoices, samples, exemplars, specimens, websites, advertising, promotional materials, marketing materials, points of sale displays,



brochures, labels, tags, packaging, containers, trademark searches, surveys or studies.

**REQUEST NO. 12:**

DOCUMENTS sufficient to identify the goods and services that YOU have offered in commerce in connection with the CHALLENGED DESIGN MARK, including but not limited to communications, invoices, samples, exemplars, specimens, websites, advertising, promotional materials, marketing materials, points of sale displays, brochures, labels, tags, packaging, containers, trademark searches, surveys or studies. In response to these requests, you produced only a few documents amounting to advertisements on your website. Please either produce documents that evidence actual use of your client's mark(s) on each and every single service listed in your recitation of services in your client's trademark registrations or confirm that no such documents evidencing use exists.

**REQUEST NO. 31:**

DOCUMENTS sufficient to identify annual sales, in dollars, of goods and services identified by the CHALLENGED WORD MARK for each year since its inception.

**REQUEST NO. 32:**

DOCUMENTS sufficient to identify the annual sales, in dollars, of goods and services identified by the CHALLENGED DESIGN MARK for each year since its inception.

**REQUEST NO. 33:**

DOCUMENTS sufficient to identify the amount of money spent on advertising, promotion or marketing for the goods and services offered in connection with the CHALLENGED MARKS from inception.

**REQUEST NO. 36:**

DOCUMENTS sufficient to identify the dollar amounts that YOU requested and received for the goods and services identified by the CHALLENGED MARKS that were sold or offered for sale in each month and year since the date that the CHALLENGED MARKS were first used in commerce, including, but not limited to, when the CHALLENGED MARKS were first used on the Internet.

RESPONSE: Registrant is not required to produce *every* document evidencing the goods and services offered under the mark, simply documents sufficient to identify the goods and services offered. Registrant asserts that it has done so and refers Petitioner to its website for further information. Registrant renews its objection to providing its confidential financial information to Petitioner. This information is not relevant to this proceeding. As stated above, Registrant (unlike Petitioner) has not alleged fame nor is secondary meaning at issue. As such, the amount of Registrant's sales is not germane to a determination of likelihood of confusion. Moreover, because damages are not at issue in a proceeding before the Trademark Trial and Appeal Board, the amount of Registrant's sales is irrelevant and Registrant is not required to produce it.



**REQUEST NO. 46:**

All DOCUMENTS that support or refute YOUR First Affirmative Defense in each of the ANSWERS.

**REQUEST NO. 47:**

All DOCUMENTS that support or refute YOUR Second Affirmative Defense in each of the ANSWERS.

**REQUEST NO. 48:**

All DOCUMENTS that support or refute YOUR Third Affirmative Defense in each of the ANSWERS.

**REQUEST NO. 49:**

All DOCUMENTS that support or refute YOUR Fourth Affirmative Defense in each of the ANSWERS.

**REQUEST NO. 50:**

All DOCUMENTS that support or refute YOUR Fifth Affirmative Defense in each of the ANSWERS.

**REQUEST NO. 51:**

All DOCUMENTS that support or refute YOUR Sixth Affirmative Defense in each of the ANSWERS.

**REQUEST NO. 52:**

All DOCUMENTS that support or refute YOUR Seventh Affirmative Defense in each of the ANSWERS.

Please see the comments regarding Interrogatories 25-31 above.

RESPONSE: Please see documents REG000294-394 and REG000472, the USPTO registry, Petitioner's website, the Wikipedia entry about Petitioner and the supporting references for that article.

**REQUEST NO. 37:**

All DOCUMENTS regarding, evidencing, memorializing, recording, or referring to REGISTRANT'S first knowledge of PETITIONER.

**REQUEST NO. 38:**

All DOCUMENTS regarding, evidencing, memorializing, recording, or referring to REGISTRANT'S first knowledge of any of PETITIONER'S MARKS or the use of any of PETITIONER'S MARKS.

**REQUEST NO. 53:**

All DOCUMENTS regarding, evidencing, memorializing, recording, or referring to any searches done in connection with the selection or use of the CHALLENGED MARKS.

You objected to Request Nos. 37, 38 and 53 on the basis that any responsive documents are protected by the attorney/client or work product privilege. While comments or opinions of attorneys relating to search reports may be privileged, actual search reports and any information concerning your client's selection process and the adoption of the marks at issue are discoverable. *Fisons Ltd. v. Capability Brown Ltd.*, 209 U.S.P.Q. 167, 170 (T.T.A.B. 1980). Furthermore, information concerning a defendant's actual knowledge of plaintiff's use of the involved mark, including whether the defendant has actual knowledge thereof, and, if so, when and under what circumstances it acquired such knowledge, is discoverable. *Volkswagenwerk Aktiengesellschaft v. MTD Products Inc.*, 181 U.S.P.Q. 471, 473 (T.T.A.B. 1974); *American Optical Corp. v. Exomet, Inc.*, 181 U.S.P.Q. 120, 123 (T.T.A.B. 1974).

Finally, you objected to several interrogatories and requests on the basis that the information requested is protected by the attorney-client privilege or attorney work product doctrine. However, you failed to produce the required privilege log. *See*, F.R.C.P. 26(b)(5)(A)(ii); *No Fear v. Rule*, 54 U.S.P.Q.2d 1551, 1556 (T.T.A.B. 2000) (such objections require "a particularized explanation of the privilege relied on, and a description of the documents which, without revealing the privileged information, is sufficient to allow the inquiring party to assess the applicability of the privilege"). Please produce a privilege log with respect to any privileged communications not identified in your revised answer.

RESPONSE: See attached privilege log.

Please contact me if you have any questions about the foregoing.

Sincerely,

A handwritten signature in cursive script that reads "Paige Mills".

Paige Mills

Attachments  
cc: Clay Sifford